

## BDAC ASSURANCES WORKGROUP

Meeting Summary  
September 9, 1997

The BDAC Assurances Workgroup held its tenth meeting on Tuesday, September 9, from 9:00 a.m. until 12:00 in Room 1131 of the Resources Building.

### BDAC Members present were:

Hap Dunning (Chair)  
Stu Pyle  
Alex Hildebrand  
Roberta Borgonovo  
Bob Raab

### Invited Participants present were:

Dennis O'Connor  
Elizabeth Patterson  
George Basye  
Dennis O'Connor

### CALFED Staff/consultants present were:

Mary Scoonover  
Eugenia Laychak  
Dave Fullerton  
Mike Heaton  
Jean Elder

### Others present were:

Ken Bogdan	Walter Kornichuk	Ros Tobe	John Kopchik
Liz Howard	Bill DuBois	Penny Howard	Cynthia Koehler
Sue Ramos	Dan Craig	Anthony Barrett	Terry Young
Tiki Baron	Peter Candy	Tom Hagler	Bill Dunn
Jim Moore	Jim Chatigny	Anthony Farrington	John Mills

1. Workgroup Chair Hap Dunning convened the meeting at 9:05 a.m. Meeting participants introduced themselves.
2. The meeting summary of July 30 was reviewed. Hap noted that several attendees were not listed on the meeting summary. The meeting summary will be corrected to reflect the attendance of all those who signed the attendance sheets. Two other clerical corrections were made.
3. Mary Scoonover reported on the CALFED schedule. While there has been no official announcement of a schedule change, it now appears that the draft PEIR/EIS will be publicly released in January of 1998, and the final PEIR/EIS will be completed by the end of 1998. The CALFED Policy Group has not yet adopted a preferred alternative. It is possible that CALFED may settle on one preferred alternative for the draft, or the draft may present a general outline of the preferred alternative with options for critical elements.

Alex Hildebrand stated that it is unlikely that BDAC will be able to make any recommendation on a preferred alternative by November or December of this year, because there will not be agreement on Assurance issues. Eugenia described the process BDAC will use to review the distinguishing characteristics of the remaining program alternatives. This review will include discussion of the tradeoffs presented by the various alternatives, and should allow BDAC to make some recommendations to the CALFED Policy Group by the end of the year.

In response to George Basye's question whether CALFED will make a decision about a preferred alternative in the absence of a BDAC recommendation, Mary said that the discussions of the two groups will move on parallel tracks, to narrow the number and range of alternatives and develop consensus on a preferred alternative.

In response to a question from Stu Pyle about timing, Mary said that due to time constraints, one level of internal, administrative review of the draft PEIR/EIS has been eliminated, but that there would be no reduction in time allowed for public review. In this way, CALFED hopes to meet its target date for the final PEIR/EIS.

4. Cliff Schulz reported on the Ag-Urban discussions. One objective of the Ag-Urban group is to consider the CALFED program alternatives and to produce comments and possibly its own version of a through Delta alternative and a dual Delta facilities alternative. The Ag-Urban group is also working on Assurances issues.
5. Cynthia Koehler reported that the environmental groups are beginning to focus on Assurance issues. The Environmental Water Caucus has established its own Assurances Workgroup and will be submitting written comments to CALFED on the Assurance proposals.

6. Alex Hildebrand said that there are some actions in the case study (particular San Joaquin flows) which he believes are physically impossible to achieve. Dave Fullerton will review the case study and other CALFED alternatives and will report back to the Workgroup on this question.
7. Mary Scoonover reported that CALFED has issued a Supplemental Notice of Intent/Notice of Preparation (NOI/NOP) which describes CALFED's intent to expand the scope of the PEIR/EIS to cover the development of a Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP). Scoping sessions have been scheduled at various locations around the state. This reflects the CALFED view the Endangered Species Act (ESA) issues should be incorporated into the ERPP, in order to avoid additional listings or other ESA problems in the future. The NOI/NOP describes three preliminary HCP alternatives. The purpose of the scoping process is to get comments on those and to see if there are other approaches or alternatives which would be useful.

In response to a question about the need for a "parallel process" to develop the HCP, Mary said that the Workgroup is not the appropriate forum to negotiate the content of the HCP, because the HCP is not only a component part of the Assurance package but it is a critical element of the ERPP as well. Both the Assurances Workgroup and the Ecosystem Workgroup will be involved in reviewing the development of the HCP, but the negotiations over such questions as (a) who is the permit holder, (b) who gets the protection of the HCP, and (c) how much of the CALFED program is covered by the HCP, will be done elsewhere.

There was some discussion about whether the parallel process of HCP development would limit or constrain the development of the Assurance package. Mary noted that the HCP is only one of several Assurance tools available and that no final decision had been made about the use of an HCP. However, it does appear that an HCP is one very useful mechanism for addressing ESA issues raised by the CALFED program, such as the need for an incidental take permit and for incorporating DOI's "no surprises" policy.

8. Hap Dunning asked about the scope of the scientific review process set up for the ERPP. Will this type of review be applied to the entire CALFED program? Mary answered that this has been considered but right now the scientific review process will be limited to the ERPP. Eugenia added that the scientific review will be done at the conceptual or landscape level, and that the scientific review panel is made up of people who have no specific expertise in the Bay Delta, who will focus more on the process and foundations of the program, rather than specific details.
9. In response to a question asked at the July 30 Workgroup meeting, Mary said that the Implementation Plan, consisting of an Assurance Package and a Financing Plan, will be included in the draft PEIR/EIS, but not as alternatives for impact analysis.

10. Mary Scoonover introduced the discussion of the Assurance proposals. The Assurance tools identified for the water quality, water use efficiency and levee integrity common program components are generally the same for both proposals. She asked the group to consider and discuss the tools proposed for these components so that we can identify where we have agreement or disagreements about the use of these tools. One of the common themes which came up in the discussion of all three of these program components is that the Assurances should be layered in such a way as to start out with tools based on voluntary implementation and market based incentives, and moving up to more regulatory based Assurances, with penalties and sanctions applied if voluntary approaches are not successful. In each case, this presents the question of who decides, based on what criteria, when it is necessary to move from one layer to the next?

11. For the water quality component, the tools identified in the Assurance proposals are regulations, legislation, physical constraints and agreements. The comments and questions from the work group are summarized below:

- Is enforcement of water quality regulations by the State Water Resources Control Board (SWRCB or State Board) a good Assurance? Is there a better way to assure enforcement of the regulations? Does the State Board need additional resources (staff and money) to enforce water quality objectives?
- Agreements between agencies on water quality in the Delta are difficult to enforce.
- There should be linkage between achieving water quality objectives and some other component of the program. There should be some kind of deadline for achieving water quality objectives with some sanction or penalty if the deadline is not met.
- Can enforcement of water quality objectives be linked to water user fees? Who would pay such fees?
- Does the ability of private citizens to sue for enforcement offer an adequate Assurance?
- Can the ecosystem manager be given some oversight authority over water quality objectives, or could the ecosystem manager impose some sanction for failure to achieve water quality objectives?
- Enforcement of water quality objectives could be tied into program phasing and sequencing (i.e., can't move into the next phase until objectives are met).
- There should be performance standards established to determine when water quality objectives are being met, with penalties or sanction imposed if performance measures are not met. This raises the question of who suffers the penalty or sanction - the ecosystem manager, the CVP and SWP, other water rights holders?

- Objectives for salinity and outflow requirements should be distinguished from objectives for waste discharge. These should have different enforcement mechanisms.
  - Assurances must also consider how standards and objectives may be changed in the future.
  - A 5000 cfs limit on new Delta conveyance facilities is not sufficient to protect the Delta as a "common pool".
12. For the water use efficiency component, the tools identified in the Assurance proposals are agreements, the agency certification process, financial mechanisms, regulations and legislation. The comments and questions from the Workgroup are summarized below:
- How does the certification process provide an Assurance that water will be used efficiently? Do the "bicameral" voting requirements of the agricultural and urban water management councils offer a workable mechanism for the certification process?
  - Does linking access to new conveyance and storage facilities for water transfers to certification create a counter-incentive to upstream interests who are concerned about adverse impacts of transfers?
  - There is no agreement among stakeholders on the content of the water use efficiency component.
  - There are no Assurances for groundwater protection.
  - The program should incorporate financial incentives for water use efficiency.
  - Assurances should describe what happens if incentives for certification do not work, what are the penalties? Also, Assurances should go beyond certification and deal with implementation.
  - The Assurances for water use efficiency should allow a window of time for the voluntary certification process to work. There will be opposition to statewide mandates for water management.
  - If there are State Board regulations on water use efficiency or water management, they should not be different than the criteria already established by the urban BMP's and ag EWMP's. Maybe the role of the State Board is to enforce the decisions of the two councils.

- It is difficult as a practical matter to separate the benefit of new facilities from the benefit of existing facilities.
  - There should be a monitoring program to evaluate the effective of water use efficiency certification process and to determine the level of benefits from this program.
13. For the levee stability component, the tools identified in the Assurance proposals are agreements, financial mechanisms, phasing and coordination with local governments. The comments and questions from the Workgroup are summarized as follows:
- What is meant by "safe harbor"? This is the arrangement which provides for habitat development on levees without interfering with levee repair and maintenance.
  - There should be Assurances for emergency repair and funding. Should the state own emergency repair equipment and assume responsibility for emergency situations?
  - Assurances should address situations where private landowners cannot or will not maintain and repair levees.
  - What is the role of the Delta Protection Commission in implementing the levee program?
  - Is the Corps of Engineers in accord with the idea of integrating ERPP habitat actions with levee maintenance programs? There is traditionally a great tension between these ideas, which will have to be resolved.
  - There will be a need for a high level of technical support from state and/or federal agencies to integrate the ERPP and levee maintenance.
14. Mary Scoonover gave an overview of the two alternative Assurance proposals. Dave Fullerton explained the major changes in Alternative No. 1 from last month's version. Mary explained the basic differences between Alternative 1 and Alternative 2. The Implementation Plan of Alternative 2 is similar in content to the Principles Agreement of Alternative 1, but would not be signed as an agreement by stakeholders. In Alternative 1, a new independent legal entity would be formed to implement the ERPP. In Alternative 2, CALFED would be formalized as a Joint Authority for management of the ERPP. Generally, most other Assurances tools, such as the operating criteria, revised WQCP, HCP/NCCP, etc. would be similar in both alternatives.
15. There was general discussion of the two alternatives. The comments and questions are summarized below:

- The general weakness of Assurances (legislation is only as good as the next legislature) suggests that it may be necessary to consider using amendments to the California Constitution to provide adequate assurances on certain critical issues.
- Regarding the oversight committee in Alternative 1, it should have broader agency representation. The stakeholder advisory role should not be limited. The stakeholders should be authorized to provide advice with respect to all matters relevant to program implementation. Some participants believe that there should be more direct stakeholder involvement on oversight, and that stakeholders should not be limited to an advisory role.
- A major issue for oversight is accountability. There must be mechanisms to ensure that the agencies are held accountable. One way to increase stakeholder engagement and provide accountability is through a reporting process, e.g., reports to Congress for which stakeholders have some responsibility, and which could be a trigger for funding or some aspect of phasing and sequencing.
- Another mechanism for accountability is judicial action by individuals or stakeholder groups.
- Regarding the composition of the DERA Board of Directors, if it is an environmental restoration agency, should the Board members represent environmental interests?
- Scientific review, in addition to IEP, should be built into the ERPP.
- Much of the Assurance proposal builds on institutions and mechanisms that are already in place, but these have not always functioned well. If the assurance package merely adds more of the same, will it be effective?
- Tools to assure ecosystem restoration are inadequate. The ecosystem manager should have environmental water rights, regulatory authority, and should be responsible to achieve legislative mandates. Also, there should be environmental performance measures.
- We have to be realistic about taking away authority from existing agencies or delegations of authority from existing agencies. There will be great resistance to this.
- Difficulty of providing these kinds of institutional Assurance further demonstrates need to rely more on physical Assurances, i.e., physical constraints on facilities.
- The scope and content of the proposed Principles Agreement may be too broad given the amount of time available to reach agreement.

16. Mary reviewed the phasing and sequencing outline in the discussion paper. Additional detail will be added to this in the next paper.

17. The next Workgroup meeting is scheduled for October 24, from 9:00 to noon.